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Criminal Discovery

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CRIMINAL DISCOVERY

United States v. Feinberg, 502 F.2d 1180 (7th Cir. 1974).

In the majority of criminal trials the determinative issues revolve around the conduct or the identity of the accused. In many instances, however, a defendant has engaged in conduct that is not per se illegal, but which will result in criminal liability only if performed with a specific wrongful intent. In this latter type of proceeding the statements a defendant is alleged to have made may often constitute the most crucial evidence upon which the ultimate decision of guilt or innocence is based. The extent to which such statements are the proper subject of pre-trial discovery has been delineated by the Court of Appeals for the Seventh Circuit in the recent decision of *United States v. Feinberg*.[1] In determining the scope of rule 16 of the Federal Rules of Criminal Procedure[2] and the effect of section 3500 of the Jencks Act[3] on the discovery rules, the Seventh Circuit held that a defendant cannot discover his statements which are contained in the statements of prospective government witness. The range of cases in which *Feinberg* may have application includes prosecutions in which a defendant's statements will be introduced by the government to establish that a criminal conspiracy existed, that a bribe was solicited, that a misrepresentation was made with intent to defraud, or any case in which an accused presently disavows a prior confession or admission of guilt.

While the impact of *Feinberg* may be widely felt, the precise issue which it presented is narrow. In brief, rule 16(a) allows a defendant to discover his own statements which are in the possession of the government. The Jencks Act, on the other hand, prohibits disclosure of statements of prospective government witnesses. The point of dispute in *Feinberg* is whether a defendant may discover statements he has made which have been related to the government by a prospective witness. In essence, the question becomes: whose statement is it when a witness reports the defendant's own words, the defendant's or the witness'? The district court found such a statement to be the defendant's, and ordered disclosure.[4] The Seventh Circuit Court of Appeals reversed.[5]

It is the purpose of this note to analyze the *Feinberg* decision at both

1. 502 F.2d 1180 (7th Cir. 1974).
2. FED. R. CRIM. P. 16.
3. 18 U.S.C. § 3500 (1971).
4. 371 F. Supp. 1205, 1215 (N.D. Ill. 1974).
5. 502 F.2d at 1183.

the district and the circuit levels, and to evaluate the government's contentions which were, in part, accepted. In form this analysis will require a review of the factual settings and procedural motions as presented to the district court, a discussion of the scope of discovery allowed under the federal rules, and a determination of whether the Jencks Act bars the disclosure of a defendant's statement contained within the statement of a prospective witness.

THE DISCOVERY ORDER

Four separate cases, of similar procedural origins, were consolidated by the district court in *Feinberg*.[6] The cases were also similar in that they were proceedings in which it might be expected that statements made by the defendant would constitute an important part of the government's evidence.

In the principal case, the defendant Feinberg was charged with use of the mails to further a scheme to defraud Cook County citizens of real estate taxes on certain properties which he owned.[7] The indictment alleged that Feinberg made a false representation to the taxing authorities that the properties were vacant, when in fact they were improved, to reduce the assessed valuation. In the companion case, the defendant Thompson was charged with soliciting and accepting a bribe[8] in connection with his official duties as the Chicago Director of the Equal Employment Opportunity Division of the United States Department of Housing and Urban Development. In the third case, which was not appealed, the defendant Kopple was charged with the unlawful distribution of a large quantity of drugs.[9] The primary issue was Kopple's intent, since it was expected that his possession and distribution of the drugs could be established. The defendant Kuta, who did not appeal, was charged with obstruction of commerce by means of extortion,[10] mail fraud,[11] and the filing of false income tax returns.[12] Kuta, a Chicago alderman and an attorney, allegedly extorted payments from three persons in respect to zoning ordinance amendments applicable to property they planned to develop, giving rise to all of the foregoing charges.

The district court noted a common thread in these cases. Unlike a criminal trial where conduct or identity is at issue, "the gravamen of each charge is the alleged purpose, knowledge or intent of each defendant at the time of his alleged conduct."[13] The court assumed that the government would attempt to prove the unlawful states of mind by reference to the defendant's

6. 371 F. Supp. at 1206-07. The four cases which were conslidated were numbered 73 CR 370, 73 CR 646, 73 CR 778, 74 CR 22.
7. 18 U.S.C. § 1341 (1971).
8. 18 U.S.C. § 201(c)(1) (1971).
9. 21 U.S.C. § 841(a)(1) (1970).
10. 18 U.S.C. § 1951 (1971).
11. 18 U.S.C. § 1341 (1971).
12. INT. REV. CODE of 1954, § 7206(1).
13. 371 F. Supp. at 1207.

own statements, and in Feinberg's case this had been admitted in court.[14] Since in each case the prosecution would be required to establish intent and since each charge arose from transactions with third parties, the court's assumption appears to be justified. Under these circumstances, the importance of knowing the statements the defendant allegedly made to third persons in order to prepare an adequate defense becomes readily apparent.

To this end, the various defendants made motions[15] which sought to discover any memoranda, transcripts, or writings of statements allegedly made by defendants to government agents or third persons, the names and addresses of persons to whom the statements were made, and the substance of oral statements made by the defendants. The motions were granted to the extent that the defendants were found to be entitled to the substance of their statements, but not to the substance of any statement of a prospective government witness unrelated to the defendant's own words. As the district court stated in granting Feinberg's motion, "rather than display a pre-existing document, it is sufficient for these purposes that the government, in narrative form, state the contents of defendant's alleged statements, the persons to whom the statements were made and the dates of the statements."[16] In essence, the district court ordered the government to make available to the defense the relevant statements[17] of the defendant in a form most convenient for the prosecution. On appeal, the government only challenged that portion of the order relating to the substance of defendant's statements, and not those parts which commanded disclosure of the names of third persons and the dates of the occurrences.[18]

The Seventh Circuit Court of Appeals held that the lower court's order could not be sustained in view of the statutory prohibitions of rule 16(b) and the Jencks Act.[19] The appellate court noted its sympathy with the principle of broad discovery in criminal cases, but found that powerful arguments mitigated against acceptance of the defendants' contentions.

The appellate opinion cited decisions from other circuits which had confronted the issues which *Feinberg* presented, and which had uniformly held that disclosure could not be permitted.[20] The court also reasoned that since the proposed amendment to rule 16, which was intended to provide greater discovery, did not allow the discovery the defendants sought, "it strongly re-

14. *Id.* at 1208 n.1.

15. Defendants Feinberg and Kuta moved for a bill of particulars pursuant to FED. R. CRIM. P. 7(f). Defendants Thompson and Kopple moved for discovery under FED. R. CRIM. P. 16(a). On the government's motion to reconsider, the court treated Feinberg's motion as one for discovery under rule 16(a). 371 F. Supp. at 1208.

16. 371 F. Supp. at 1208.

17. FED. R. CRIM. P. 16(a) provides for a requirement of relevancy. *See* text of statute following note 23 *infra.*

18. 502 F.2d at 1181 n.4.

19. *Id.* at 1181.

20. *See* cases and discusion following note 39 *infra.*

inforces our holding that the present rule does not permit the discovery sought."[21] And in considering the practical implications of the disitrict court's order, the appellate court felt it would be "manifestly impossible to reveal the contents and circumstances of a defendant's statement without also revealing the contents of the prospective witness' statement which is forbidden by Section 3500."[22]

RULE 16(a)-(b)

Prior to considering the effect of the Jencks Act, both the district and the circuit courts were confronted with the threshold question of whether the discovery requested was within the scope of rule 16(a). The government had opposed the district court's ruling, contending that rule 16(a) does not authorize disclosure of statements made to non-government agents, while the Jencks Act strictly forbids it. Before proceeding with a discussion of the applicability of the Jencks Act, an examination of the scope of rule 16(a) is necessary to determine whether the disclosure ordered is within the contemplation of the rule.

Two sections of rule 16 are germane to the issue presented in *Feinberg*. In pertinent part, rule 16(a)[23] provides:

> . . . the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements . . . made by the defendant . . . within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

and rule 16(b)[24] provides that:

> . . . this rule does not authorize the discovery or inspection . . . of statements made by government witnesses or prospective government witnesses (*other than the defendant*) to agents of the government except as provided in 18 U.S.C. § 3500 (emphasis added).

The government's contention that the two rules do not contemplate disclosure of statements made to non-government agents was rejected in both the district court and the court of appeals. The appellate court relied upon the Notes of the Advisory Committee to the Supreme Court which "make it plain that the words 'to the attorney of the government' modify the phrase 'the existence of which is known, or . . . may become known' " in holding that rule 16(a) is not limited to direct communications between the defendant and the government.[25] The district court also found that the Notes of the

21. 502 F.2d at 1182.
22. *Id.* at 1183.
23. FED. R. CRIM. P. 16(a).
24. *Id.* 16(b).
25. 502 F.2d at 1181.

Advisory Committee demonstrated that no such restriction was intended.[26] Additionally, the district court noted that rule 16(a) did not contain language suggesting such a limitation, and as rule 16(b) did, its omission from rule 16(a) could "only be regarded as a clear manifestation that the statements . . . which are discoverable under 16(a) are not limited to statements made to agents of the government."[27]

In reaching agreement over the scope of rule 16(a), both courts placed themselves in line with the general weight of authority.[28] The area of dispute between the two courts is thus considerably narrowed. The issue is limited to the interpretation and the application to be given to section 3500 of the Jencks Act. If the Act is not a bar to the disclosure of the substance of a defendant's statement contained within the statement of a third party, then it is purely a matter of discretion to order such discovery.

THE JENCKS ACT

The language of the Jencks Act, which is relevant to the issue presented in *Feinberg*, provides;

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective government witnesses (*other than the defendant*) shall be the subject of subpena [*sic*] discovery, or inspection until said witness has testified on direct examination in the trial of the case. (emphasis added).

The district court did not find the language of this provision to bar the disclosure ordered, nor were any of the cases relied upon by the government considered sufficient to compel a different holding. The government's theory was that when a defendant has made a statement to a third party, and that third party repeats the statement to the government, the defendant's statement "is absorbed into the statement of the third party" and hence is not discoverable until after direct testimony at trial.[29]

The government's position is weakened by the parenthetical exclusion in section 3500 of a statement made by the defendant. To contend that when a statement of a defendant is repeated by a third party, it becomes the statement of the third party alone seems to be an exercise in semantics not contemplated by the literal terms of the statute. The inconsistency of the government's position is especially apparent when it is remembered that they were ordered to prepare a narrative summary of that which the defendant

26. The Notes of the Advisory Committee are reported 39 F.R.D. 175-178 (1966).

27. 371 F. Supp. at 1211.

28. *See, e.g.*, United States v. Crisona, 416 F.2d 107 (2d Cir. 1969); United States v. Lubomski, 277 F. Supp. 713 (N.D. Ill. 1967); United States v. Iovinelli, 276 F. Supp. 629 (N.D. Ill. 1967); United States v. Baker, 262 F. Supp. 713 (D.D.C. 1966).

29. 371 F. Supp. at 1212.

was alleged to have said, while excising any portion of the conversation which could be said to be the prospective witness' own words.[30] A defendant might well wonder how a statement which is not considered to be his for purposes of discovery, can be the very words which make him criminally liable at trial. Yet that is the basis of the government's argument. This reasoning leads to conclusions not contemplated by either rule 16(a) or the Jencks Act. As stated by the district judge:

> Indeed, were I to adopt the Government's reasoning, it would follow that a defendant could not obtain disclosure of an in-custody oral confession made to an agent of the government and thereafter memorialized in the agent's report because to do so would be to order discovery of the statement of a prospective witness, i.e. the agent's statement that the defendant had confessed.[31]

A literal interpretation of section 3500(a) appears to lead to the conclusion that Congress did not intend to limit a defendant's access to his own words regardless of the form in which they are memorialized. A consideration of the purposes of the act supports this conclusion.

The Supreme Court undertook an extensive review of the legislative history and purpose of the Jencks Act in *Palermo v. United States*.[32] The Court noted that the primary concern which led to enactment of the law was the fear that a witness might be unfairly impeached with words other than his own which were "the product of the investigator's selections, interpretations, and interpolations."[33] The primary thrust of the Jencks Act was to prevent this abuse, and not to limit the defendant's access to his own statements.[34] A reading of *Palermo* supports the conclusion of the district court that "[i]t is the statements of prospective government witnesses and those statements alone to which the act is addressed."[35]

A discussion of the purpose of the Act therefore turns on the same point as a discussion of the scope of the Act's language, i.e. to whom does a statement belong when a prospective government witness reports to the government words spoken by the defendant? The district court determined that a person's statement remains his own, regardless of who "witnesses, reports, or memorializes it."

30. *See* text preceding note 16 *supra*.
31. 371 F. Supp. at 1213.
32. 360 U.S. 343 (1959).
33. *Id.* at 350.
34. Four members of the Court viewed the Jencks Act in even less restrictive terms. *See* the concurring opinion of Justice Brennan 360 U.S. at 365:

> Although it is plain that some restrictions on production have been introduced, it would do violence to the understanding on which Congress, working at high speed under the pressures of the end of a session, passed the statute, if we were to sanction applications of it exalting and exaggerating its restrictions, in disregard of the Congressional aim of reaffirming the basic *Jencks* principle of assuring the defendant a fair opportunity to make his defense.

35. 371 F. Supp. at 1213.

> As the government reminded "We must think things not words, or at least we must constantly translate our words into facts for which they stand if we are to keep the real and true."[36] The "things" and "facts" here are that the Government will assert that a defendant made a statement. The overriding philosophy of pre-trial discovery is that the defendant is entitled to know the contents and circumstances of that statement.[37]

The Court of Appeals for the Seventh Circuit did not agree.[38] Although the appellate court approved the holding that rule 16(a) is not limited to statements made to government agents, it held that the Jencks Act bars discovery of statements of government witnesses, "including those parts which relate conversations of the defendant."[39]

In articulating this holding the court relied upon three cases. In *United States v. Kenny*[40] the Third Circuit considered a motion to discover the statement of prospective government witnesses which set forth conversations with the defendant. The court, with little discussion, denied the motion and referred to *United States v. Fioravanti*,[41] where the same contention was said to have been rejected. In *Fioravanti*, however, the specific issue presented in *Kenny* was never reached or considered. The court there determined that the notes the government agent made during a conversation with the defendant were not sufficient to constitute a statement at all,[42] and thus the issue of whether the defendant would be entitled to discover a valid statement was never reached.[43] The *Kenny* opinion also failed to expressly consider the parenthetical exclusion of statements made by a defendant contained in both rule 16(b) and the Jencks Act. The decision can be considered as no more than weak support for the Seventh Circuit's holding in *Feinberg*.

A more detailed consideration of the precise issue presented in *Feinberg* can be found in the Sixth Circuit's decision in *United States v. Wilkerson*,[44] the second case cited by the Seventh Circuit in support of its holding. In *Wilkerson* the defendant had made self-incriminating statements to one Lowery, who repeated the statements to the FBI. When the defendant sought to inspect any relevant written or recorded statements or confessions, the gov-

36. O.W. Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899).

37. 371 F. Supp. at 1213-14.

38. *See* note 19 *supra* and accompanying text.

39. 502 F.2d at 1182.

40. 462 F.2d 1205 (3d Cir. 1972).

41. 412 F.2d 407 (3d Cir. 1969).

42. There has been come controversy in the courts over the proper definition of the word statement. *See generally* 1 WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 253 (1969).

In United States v. Iovinelli, 276 F. Supp. 629 (N.D. Ill. 1967), a restrictive view of the term was rejected, and summaries of a defendant's statements were considered to be subject to discovery in United States v. Morrison, 43 F.R.D. 516 (N.D. Ill. 1967).

43. 412 F.2d at 411-12 n.12.

44. 456 F.2d 57 (6th Cir. 1972).

ernment responded that they had none.[45] On appeal the court held that it was not error to refuse to strike Lowery's testimony at trial, since the court did not consider the memorandum of his conversation with the defendant to be a proper item for discovery.[46] In deciding that the Jencks Act barred disclosure, the *Wilkerson* court reasoned that while it might be better to allow a defendant to inspect statements which arose out of post-arrest interrogations, in order to prepare defenses such as the involuntariness of the confession, these considerations were not applicable when the statements had been made to third parties. The court also stated that "the language of both Rule 16(a) and of the Jencks Act indicates that the focus of this discovery rule is on direct communication between a witness and the Government."[47]

As the district court in *Feinberg* noted, the thrust of *Wilkerson* is that rule 16(a) and section 3500 are directed at communications between a defendant and the government.[48] This limited view of the scope of rule 16(a) was rejected by the district court, and was also rejected by the court of appeals.[49] The anomalous situation is thus presented whereby the appellate decision supports its holding on the second issue in *Feinberg* by relying on *Wilkerson*, a decision premised on a conclusion opposite that which was reached in deciding the first *Feinberg* issue. In effect, *Wilkerson* reasons that a statement is not discoverable when made to a third person because the thrust of rule 16(a) is on diriect communication between the defendant and the government. Thus while *Wilkerson* reached the same result as the court in *Feinberg*, it did so on a rationale inconsistent with the holding that rule 16(a) is not limited to statements of the defendant made to government agents.[50]

The third case cited by the Seventh Circuit in support of its decision is *United States v. Dorfman*,[51] where the court refused to allow discovery of oral statements made by the defendant to third parties. The court first distinguished the Second Circuit case of *United States v. Crisona*,[52] where a tape recording of a defendant's conversation with a third party was made available for discovery.[53] The court assumed, on the basis of *Crisona*, that a tape recording or a written statement of the defendant given to a third person would be discoverable. But an oral statement could not be disclosed since

45. *Id.* at 61.
46. *Id.*
47. *Id.*
48. 371 F. Supp. at 1215.
49. *See* text preceding note 25 *supra.*
50. 502 F.2d at 1182.
51. 53 F.R.D. 477 (S.D.N.Y. 1971), *aff'd on other grounds* 470 F.2d 246 (2d Cir. 1972).
52. 416 F.2d 107 (2d Cir. 1969).
53. Several cases have allowed similar disclosure of tape recordings of a defendant's conversations with third persons. *See, e.g.*, United States v. Black, 282 F. Supp. 35 (D.D.C. 1968).

the defendant's statement could "only be admitted through the testimony of that third person."[54] This distinction apparently failed to consider that tape recordings and written statements cannot ordinarily be introduced at trial without being authenticated and supported by a witiness' testimony.[55]

The court in *Dorfman* also stated that no exception is made in rule 16 for oral statements made by a defendant to a third party, without discussing the express exception included in both rule 16(b) and section 3500.[56] In discussing legislative purpose, the court failed to determine why, when precluding discovery of statements of government witnesses, Congress added a parenthetical exclusion of the defendant's statement.

The decision in *Dorfman* seems primarily motivated by a fear of "disclosing almost the whole of the government's case",[57] although the reasons for maintaining the element of surprise are not listed. The reasoning of the case closely resembles the argument, presented by the government in the district court in *Feinberg*, that statements of defendants reported by a third person, unlike tape recordings or written statements, do not have a "palpable existence" apart from the testimony of the witness.[58] This argument seems to be based more on semantics than legal effect. A defendant faced with criminal sanctions based upon such statements will be quick to perceive their "existence", as their entire probative worth is based on the sole fact that they were allegedly made by him and not by the prospective witness.

The cases relied upon by the court of appeals demonstrates that the narrow issue in *Feinberg* was not conclusively decided prior to their decision.[59] Of the three cited cases, only *Dorfman* provides strong support for the court's holding, and its reasoning is subject to question. These cases were not, however, the only basis of the decision. The court also spoke of the practical impossibility of revealing a defendant's statement contained in the

54. 53 F.R.D. at 479.
55. *See, e.g.*, 11 CAL. EV. C. § 1401 (1967).
56. 53 F.R.D. at 479.
57. *Id.* at 478.
58. 371 F. Supp. at 1213.
59. Several cases relied upon by the government in the district court were not mentioned in the appellate opinion. United States v. McMillen, 480 F.2d 229 (7th Cir. 1972), was a case in which the defendant sought disclosure of a statement made by a co-defendant, and thus was not germane to the issue in *Feinberg*. The government also relied upon United States v. Percevault, 490 F.2d 126 (2d Cir. 1974), which, like *McMillen* involved statements of a co-defendant. In United States v. Sepulveda, 478 F.2d 1406 (7th Cir. 1973), no written opinion was handed down, the above citation referring only to a Table of Unreported Cases. Though the case would seem to support the government, it is devoid of precedential value under 7TH CIR. R. 28.

Another unreported case, not mentioned in either the district or circuit court opinions, is United States v. Feld, 70-CR 109 (N.D. Ill. 1970), which directly supports the discovery order granted by the district court, according to United States v. Dorfman, 53 F.R.D. 477, 480 (S.D.N.Y. 1971) where *Feld* is discussed. Like *Sepulveda*, however, *Feld* has no precedential value under rule 28.

reports of a prospective witness, and stated that the proposed amendment to rule 16 supports their decision as to the effect of the present rule.[60]

The court carefully noted that they were not overruling past decisions allowing a defendant to discover his own statements, acknowledged a possible linedrawing problem, and set forth a guiding principle.

> A defendant's statement is discoverable when it or an account thereof is "written or recorded", (Rule 16(a)(1)) promptly after the statement is made. Where a written record is contemplated when the statement is made and an account of the statement is eventually written down, the writing should be discoverable even if there was some delay. But where the statement is originally memorialized only in the recollection of a witness, then it is not discoverable even if that witness' recollection is eventually written or recorded.[61]

In setting forth this guideline the court seems to acknowledge that the statements in question are statements of the defendant, separate and apart from statements of the prospective witness. This would seem to satisfy the literal requirements of rule 16(a) and avoid the bar of section 3500. It is also interesting that the court appears to be positing a time-test in regard to when the statement was written or recorded. While the contemporaneity of a government witness' statement is relevant in determining whether it will be disclosed after testimony at trial under section 3500(e),[62] prior decisions in the Seventh Circuit district courts have rejected a restrictive definition of the word statements in construing rule 16(a).[63] The court intimates that a defendant's statement will never be discoverable when originally memorialized in a witness' recollection, regardless of how quickly the witness reports to the government, which seems to suggest that contemporaneity is not truly the issue.

A potentially stronger argument presented by the court is included in its acceptance of the government's rationale that it is "manifestly impossible" to reveal a defendant's statement without also revealing the independent statement of the prospective witness, which would violate section 3500.[64] Aside from the fact that the difficulty in disclosing a statement does not change the central issue of whether it is or is not a statement made by the defendant, this argument also does not take into consideration the potential use of the trial judge's discretion, the possibility of protective orders,[65] and the number of cases in which the substance of statements has been successfully disclosed.[66] It might also be noted that the impossibility of reveal-

60. *See* text following note 20 *supra.*
61. 502 F.2d at 1182-83.
62. 18 U.S.C. § 3500(e) (1971).
63. *See* note 42 *supra.*
64. 502 F.2d at 1183.
65. FED. R. CRIM. P. 16(e).
66. *See* United States v. Curry, 278 F. Supp. 508 (N.D. Ill. 1967); United States

ing a particular form of a defendant's statement can never really be determined if the government cannot be required to make such statements available for in camera inspection. The problem could be better handled on a case by case, discretionary basis than by use of a general prohibition.

PROPOSED AMENDMENT TO RULE 16

The Seventh Circuit noted that the proposed amendment to rule 16(a)[67] "strongly reinforces our holding that the present rule does not permit the discovery sought." The court concluded that prohibiting the disclosure sought would protect the integrity of the government's evidence, and that this was the probable motivation of the draftsmen in changing the present rule. The proposed rule states that the defendant "shall" be permitted to discover:

> . . . the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent.[69]

The court interpreted this as a limitation on the extent of discovery which a defendant could receive, although the Notes of the Advisory Committee indicate that this is not the intended result.

The replacement of the word "may" by the word "shall" in the proposed rule is intended to make discovery of the types of statements listed a matter of right. The Advisory Committee Notes state: "the rule is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases."[70] Thus the new rule, presently scheduled to go in effect August 1, 1975,[71] does not preclude the question presented in *Feinberg*. As the comments indicate, the new rule is not to be viewed as a limitation, and the discovery sought in *Feinberg* could reasonably be considered one of the areas in which the discretion of the trial judge is intended to govern. The frequent reference in the committee's notes to the *ABA Standards Relating to Discovery and Procedure Before Trial*, which expressly allows discovery of "any written or recorded statements and the substance of any oral statements made by the accused,"[72] also leads to the conclusion that the intention of the draftsmen is consistent with the decision entered by the district court.

v. Morrison, 43 F.R.D. 516 (N.D. Ill. 1967); United States v. Reid, 43 F.R.D. 52 N.D. Ill. 1967). *But see* United States v. Armantrout, 278 F. Supp. 517 (S.D.N.Y. 1968); United States v. Elife, 43 F.R.D. 23 (S.D.N.Y. 1967).

67. 62 F.R.D. 271, 305 (1974).
68. 502 F.2d at 1182.
69. 62 F.R.D. at 305.
70. *Id.* at 308.
71. Act of July 30, 1974, Pub. L. No. 93-361, 88 Stat. 397.
72. ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft 1970), § 2.1(a)(iii) at p.13.

CONCLUSION

The discussion in this note has attempted to demonstrate that there is no statutory impediment to allowing a defendant to discover the substance of his statements which have been reported to the government by a prospective witness. Neither the case law on the question, nor the intent of the draftsmen of the rules, nor even the practical implications of such disclosure mandate the conclusion reached by the court of appeals.

In its holding, the Seventh Circuit has approved the tenuous conclusion that a statement which may be attributed to a defendant at trial, and which may impose criminal sanctions upon him, is not to be considered as a statement of the defendant's for purposes of discovery. The decision in *Feinberg* will not serve to protect the safety or integrity of prospective government witnesses, since it may reasonably be presumed that an accused who would resort to intimidation and coercion would do so regardless of whether or not his discovery motions were granted. The result of *Feinberg* can only be to render more difficult the preparation of an adequate defense in those cases in which a defendant's statements to third parties are to play a significant role. Should the opportunity be presented,[73] the appellate decision in *Feinberg* should be overruled, and the holding and reasoning of the district court should be expressly approved.

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73. A petition for certiorari is being prepared, and will be filed on behalf of the defendant Feinberg. (Personal interview with Joseph Lamendella, attorney for defendant Feinberg, Oct. 23, 1974).